UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60608
Summary Calendar

HAROLD L. WASHINGTON,

Plaintiff-Appellant,

VERSUS

JAMES A. COLLINS, ET AL.,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(C.A. G-91-402)

(May 19, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

When Texas state prisoner Harold L. Washington arrived at the Retrieve Unit on May 9, 1991, he was assigned to the garden squad. He filed grievances and medical requests stating that he was unable to perform the assigned work because of a preexisting back injury

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

and ear infection, and he was eventually reassigned to the medical squad within a month of his arrival at the unit. Prior to his reassignment to the medical squad, however, Washington received several disciplinary sanctions for refusing to work.

Washington filed a pro se, in forma pauperis (IFP) civil rights complaint alleging that he was denied adequate medical care and required to perform work beyond his physical capability in violation of the Eighth Amendment and that he was disciplined for failing to work in violation of the Due Process Clause. He also alleged that the defendants conspired to violate his constitutional rights. Following a Spears[1] hearing, the district court dismissed the complaint as frivolous.

OPINION

A complaint filed IFP can be dismissed sua sponte if the complaint is frivolous. 28 U.S.C. § 1915(d); Cay v. Estelle, 789 F.2d 318, 323 (5th Cir. 1986). A complaint is frivolous if it lacks an arguable basis in law or fact. Ancar v. Sara Plasma, Inc., 964 F.2d 465, 468 (5th Cir. 1992). This court reviews the district court's dismissal for an abuse of discretion. Id.

Eighth Amendment Claim[2]

Washington argues that he was denied adequate medical care in violation of the Eighth Amendment. To state a medical claim

[1] Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

[2] Washington argues that he has a "liberty interest" in receiving proper medical care and not being required to perform work he is physically unable to do. These allegations are more appropriately treated as an Eighth Amendment violation and will be analyzed under that standard.

cognizable under § 1983, a convicted prisoner must allege acts or omissions sufficiently harmful as to evidence a deliberate indifference to serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106 (1976). A prison official acts with deliberate indifference under the Eighth Amendment "only if he knows that [an] inmate[] face[s] a substantial risk of serious harm and [he] disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 114 S. Ct. 1970, 1984 (1994); see Reeves v. Collins, 27 F.3d 174, 176-77 (5th Cir. 1994) (applying the Farmer standard in the context of a denial-of-medical-care claim). Unsuccessful medical treatment, negligence, neglect, and even medical malpractice do not establish an Eighth Amendment violation. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

Washington was treated repeatedly by the medical staff for complaints about back pain and a persistent ear infection. In June, X-rays were taken of his back and he was diagnosed with a degenerative disc disease. Following the diagnosis, appropriate changes were made to Washington's medical classification. He also received medication for the back pain. Although Washington believes that he should have received different and more treatment for his back condition, these allegations amount to nothing more than disagreement with the treatment received and are insufficient to allege a cognizable Eighth Amendment claim. See Varnado, 920 F.2d at 321. The district court properly dismissed the claim as frivolous.

Washington also argues that he was required to perform work

beyond his physical capability. Washington alleged that after he was transferred to the medical squad he was required to lift 75-pound sacks of vegetables and to stand up for more than four hours in violation of his medical restrictions. If Washington's allegations are true, he may have alleged a cognizable Eighth Amendment violation. See Jackson v. Cain, 864 F.2d 1235, 1246 (5th Cir. 1989) (requiring an inmate to perform physical labor that significantly aggravates a serious medical ailment constitutes an Eighth Amendment violation). The portion of the judgment dismissing the work assignment claim is vacated, and the case remanded to the district court for further proceedings.

Due Process Claim

Washington also argues that he was disciplined without due process for refusing to perform work beyond his physical capability. He contends that the disciplinary hearing officer failed to investigate adequately his excuses for failing to report to work because one of the disciplinary cases was expunged from his record for failure to investigate his medical excuse.

The federal courts have a narrow role in the review of prison proceedings. Stewart v. Thigpen, 730 F.2d 1002, 1005 (5th Cir. 1984). If a prisoner is provided a procedurally adequate hearing prior to the imposition of disciplinary sanctions, there is no constitutional violation. When minor disciplinary sanctions are imposed, due process requires only notice of the charges and an opportunity to respond. Cooper v. Sheriff, Lubbock County, Tex., 929 F.2d 1078, 1083 (5th Cir. 1991); see Hewitt v. Helms, 459 U.S.

460, 476 (1983). Federal review of the sufficiency of the evidence is limited to determining whether the finding is supported by any evidence at all. Stewart, 730 F.2d at 1005-06.

Washington admitted that he received notice and an opportunity to respond to the allegations, but contends that the disciplinary officer should have accepted his proffered explanation that he had a legitimate excuse for refusing to work. Because there was some evidence to support the finding of guilt, the district court properly dismissed his due process claim as frivolous. See McCrae v. Hankins, 720 F.2d 863, 868 (5th Cir. 1983) (the Constitution mandates due process, it does not guarantee error-free decision-making).

Finally, Washington argues that the defendants conspired to violate his Eighth Amendment rights by requiring him to perform work beyond his physical capability. Washington alleged no facts to support his conspiracy allegations, other than the assumption that the failure to remove him from field work necessarily established a conspiracy. Washington's conclusional allegations are insufficient to allege a conspiracy claim. See Wilson v. Budney, 976 F.2d 957, 958 (5th Cir. 1992).

Motion for Appointment of Counsel

Washington has filed a motion for appointment of counsel. However, he has adequately presented the factual and legal basis of his claims, and we hold that this case does not present such exceptional circumstances warranting appointment of counsel. See Ulmer v. Chancellor, 691 F.2d 209, 212 (5th Cir. 1982). This

motion is denied.

The portion of the judgment relating to work assignment claims is VACATED and REMANDED to the district court for further proceedings thereon. All other aspects of the judgment are AFFIRMED.

E. GRADY JOLLY, Circuit Judge, dissenting:

I would affirm the judgment of the district court in all respects.